SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-314

WILLIAM F. ADCOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, William F. Adcock, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 16, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this brief. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 16, 1971. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Did the supplemental "Allen charge" [*Allen* v. *United States,* 164 U.S. 492, 501-2 (1893)] deprive the petitioner of his constitutional right to a fair trial? Should the "Allen charge" be permitted in the Federal courts?

2. Was reversible error committed by adding to the "Allen charge" an instruction that the jury should consider the expense in time and money of the trial and of a future trial which would take place if a verdict was not reached?

Statement of the Case

William F. Adcock was charged by indictment 69 Cr. 407 in the United States District Court for the Southern District of New York with five counts of making and causing to be made false statements in various forms filed with the Immigration and Naturalization Service, in violation of 18 U.S.C. Section 1001 and 18 U.S.C. Section 2. Count 1 charged the petitioner with making a false statement in a notice of appearance form by alleging that he was an attorney in good standing in the State of Kentucky and was not under a court or administrative order suspending, en-

joining, restraining, disbarring or otherwise restricting him in practicing law. Count 2 charged that the petitioner made false statements on INS forms submitted on behalf of an alien with respect to the alien's employment and source of income, and that a false statement was made by the petitioner when he failed to sign the INS form as the preparer. Counts 3 and 4 duplicated count 2, differing only in that the forms were prepared for other aliens. Count 5 charged that a false statement was made in the form of another alien when the petitioner failed to sign the application as preparer.

Adcock was found guilty under counts 1, 2 and 5 of the indictment, and was found not guilty under counts 3 and 4, after a trial in the United States District Court for the Southern District of New York, before Hon. Irving Ben Cooper and a jury. On February 25, 1971 he was sentenced to a term of one year in jail on counts 1, 2 and 5, the sentences to run concurrently.

On appeal, the United States Circuit Court for the Second Circuit reversed the convictions under counts 2 and 5, but affirmed the conviction under count 1 of the indictment.

Statement of the Facts

The Government's Case

George Henry Lara, a supervisory immigration examiner with the United States Immigration and Naturalization Service (hereafter INS), testified that he is attached to the New York INS office where he adjudicates applications by aliens, such as visa petitions, applications for

permanent residency, and applications for extensions of temporary stays (2-4).*

Lara explained that when an alien receives a visa, he he also gets a I-94 immigration departure form. An application to extend a stay is made on an I-539 form which solicits information about the alien, such as whether he worked while in the United States. The form contains a place for a signature, and another place where the preparer of the application, if other than the alien, is supposed to sign, since forms are often prepared for the alien by attorneys, friends, family, and even travel agents (11-13, 43-6). A renewal officer checks to see that the passport is in order and that the alien has sufficient funds for the length of time he wishes to extend his stay, since aliens on temporary stays are not allowed to work. The officer also checks to see that the visitor is in status, that is, that his visa has not already expired or the terms of the stay violated. If a visitor is found to have worked, he is "in violation of status" and would be given 30 days to leave the country or be deported (13-17).

Mr. Lara further testified that form G-28 is a notice of entry of appearance and must be submitted by a lawyer or representative appearing for an applicant at an appeal, exclusion or deportation proceeding (24). It is like a notice of appearance in court and entitled lawyers to copies of all papers, etc. Accredited organizations, such as Catholic Charities, may also appear for an alien and file a G-28 form (25, 36-7, 45). The Board of Immigration Appeals consists of a chairman and four members who hear appeals

* Refererices are to the pages of the appellant's appendix in the Court of Appeals.

from decisions of special inquiry officers in exclusion, deportation, and denial of visa cases (28).

Since 1965, when the law was changed to allow sleep-in domestics permanent residency, there were many who came to the United States as tourists, and then obtained jobs and permanent residency (46-9). Substantial numbers of aliens are known to violate status by working (52-4). Even when they are found to violate status, and are granted voluntary departure, the alien, if he had a labor certification as a sleep-in domestic, could be back in the United States as an immigrant in a few months (58).

Regarding Count 5

Volda Watson, a 29-year-old citizen of Jamaica, West Indies, testified that she is a teacher at the Crestview School for emotionally disturbed children (60). She entered the United States in September, 1967 as a visitor for four months and stayed with her father in Mount Vernon (61). Although she knew she was not supposed to work when she got the visa (138), she nevertheless obtained a job at the Crestview Nursing Home in October 1967 (61-2).

The defendant was hired by the witness' father, and Miss Watson saw Adcock first in May, 1968 at the defendant's office (62-3). There, she asked about an extension of her stay, because the first extension she had received was going to expire shortly. The first extension had been obtained by sending her passport and $10 to the defendant, and she later received the passport and an extension for three months from INS (67-8, 135). She also asked whether it was all right to work, and the defendant told her it

was since her permanent residency papers were being processed (66). The defendant also remarked that it was easier for her to become a permanent resident as a domestic (67).

While in the defendant's office, he gave her an I-539 form, the application for an extension of stay (Exh. 5, 594-5). She signed it in blank, and did not put the information contained on it in the form. She first saw the typewritten material when it was shown to her by a government investigator. Although the defendant did some typing when she was in his office, she did not know whether he was typing her form. She paid Adcock $15 or $25, for his services, $10 of which was for the filing fee (69-74, 79-80, 125).

Miss Watson knows she can be deported after her testimony (119-20) and related that the INS has her passport with instructions not to return it without the approval of Mr. Gottlieb, an INS inspector (129).

The information contained on the application was correct. (121-4).

Regarding Count 2

Rosetta Norman, a citizen of Jamaica, West Indies, entered the United States on August 1, 1967 for a three-month temporary stay to visit relatives (83-5). Although she knew she was not allowed to work, she nevertheless obtained a job three weeks later (85-6).

The witness saw the defendant in his office in November, 1967, and told him that her time was running out and

she wanted to extend her stay. She gave Adcock $10 and her passport (87-8, 90). The defendant asked her if she was working, and she admitted to him that she was, and told him where (91-2). Adcock then gave her a form to sign (Exh. 2, 588-9), and she signed it in blank. Nothing was written on it, except for printed matter (93-4, 97-8). She did not support herself by savings, as it was alleged on Exhibit 2, but by working (98), although when she first came to this country she had $1,000 in a Jamaica bank and $400 in savings (159-61). After she signed the blank form, she left it with the defendant, and a few weeks later received an extension for four months (99). The witness also had discussed obtaining permanent residency with the defendant, and he gave her some papers for her employer to fill out. She returned these a few weeks later (91, 99-101). In July, 1967, the INS asked the witness to leave the country on a voluntary departure basis, but she became a permanent resident in December, 1968 (156, 162-4, 299).

Regarding Counts 3 and 4 (not guilty)

Cynthia Mulligan Hill, a citizen of Trinidad, works in the United States as an assistant nurse at Beth Israel Medical Center (170). She entered the country on January 30, 1967 as a visitor on a six-month visa (171-3).

In August, 1967 she obtained a job as a domestic, though she knew visitors were not allowed to work (174-5). She also had obtained an extension by personally going to the INS and filling out forms (171-3), and supported herself through savings until she obtained the job as a domestic (194).

She first saw the defendant at his office in August, 1967 (176-9, 186) and asked him to help with papers to become a permanent resident (180). In November she saw Adcock about obtaining an extension, and the defendant gave her a blank form to sign (Exh. 3, 590-1). In January 1968 she saw the defendant for another extension, and again signed a blank form (Exh. 4, 592-3) (191-2).

Other Similar Acts

Elsie Reid, a citizen of Jamaica, entered the United States in September, 1967 as a one-month visitor (267-8).

She saw Adcock at his office to obtain an extension and he typed a form which she signed. She gave him $10 and received an extension to December (270). In October she was employed as a sleep-in domestic, although she knew she was not allowed to work (271-2). Later, she obtained permanent residency forms from the defendant (273).

Regarding Count 1

Kevin J. McInerney, a former Assistant United States Attorney for the Southern District of New York, testified that he was in charge of the investigation of the defendant's case, and identified Adcock's signature on a bail bond. He also stated that when he saw the defendant during the grand jury proceedings, Adcock gave him proof that he was admitted to practice law in the State of Kentucky, as well as in the Federal District Court for the Western District of Kentucky, and in the Tax Court of the United States (264).

Joseph A. Farrell, a criminal investigator for INS, saw the defendant at the INS offices on April 18, 1968. Adcock

was with a Ruthel Blair, an alien, and Miss Blair said that the defendant was her lawyer. Adcock submitted a notice of appearance form signed by him (281-4).

Restituto Estacio, a doctor at Goldwater Memorial Hospital, was born in the Philippines. His wife, Carmen Estacio, is also a medical doctor, and they came to the United States in 1960 as exchange visitors (317-19).

The witness met the defendant in his office in 1966, and asked Adcock to obtain permanent residency for him and his wife. He supplied the defendant with papers and paid him a retainer of $50.00 (321-3). Adcock was his lawyer until 1969, and was his lawyer in July 1968 (343), when Exhibit 1 (586-7), a notice of appearance form, was filed.

Saul Fine, formerly with INS, witnessed the defendant's signature on October 12, 1953 o na document (348-50). As a result, the defendant's certification of admission before the Board of Immigration Appeals was surrendered (351-2).

Exhibit 21, the defendant's consent to disbarment from the INS, dated October 12, 1953, was then introduced in evidence (358, 596-9), along with Exhibits 22B and 23, the order of disbarment from the Board of Immigration Appeals and the Attorney General's approval (358, 600-4).

Leslie G. Whitmer, a lawyer and assistant director of the Kentucky State Bar Association, keeps official rosters of attorneys in Kentucky, and collects dues from members of the Bar and prosecutes disciplinary cases (375-6).

In 1966 to 1968 is was necessary to be a member of the Bar Association in order to practice law in Kentucky

where, since 1936, there has been an "integrated" Bar (377-81).

The witness checked the roster for 1966-68 and found the defendant's name does not appear for those years (381). The defendant's name does not appear on the roster for any year since the integrated Bar has been in operation (382). Adcock was therefore not authorized to practice law in Kentucky and not a member in good standing of the Kentucky Bar (382).

The records do indicate, however, that the defendant was admitted to practice law in Kentucky in 1927. Adcock did not automatically become a member of the Bar when it was integrated. Members were notified that they could not practice until they became members of the Bar Association when the Bar was integrated (390), but Adcock did not apply for admission to the Bar after integration (382-3).

The witness believed that defendant's Exhibit F (613-14), a certificate of good standing in the Kentucky Court of Appeals, and Exhibit G (615-16), a green membership card in the Kentucky Bar, both in the name of the defendant, were erroneously issued to Adcock, since only the official computerized roster contains the names of Bar members, and Adcock's name is not on it (389, 393, 396-8, 403-13).

Henry Harned, director of the Kentucky Bar Association, testified that he received an application for reinstatement from the defendant dated October 26, 1970 (438-9; Exh. 30, 605-12). The application was not approved, since it was not presented to the Board of Governors which decides on readmissions (445-6, 449). Reinstatement ap-

plications for non-payment of dues must be submitted to the Board of Governors for approval (460). A check from the defendant for two years' non-resident dues of $35 was received on November 5, 1970, but was erroneously deposited. It should not have been accepted until Adcock was reinstated and procedural technicalities were passed upon (447-9).

Adcock was not on the official roster for 1967-68 (453, 456). Exhibit G, the green membership card, was issued by the Bar Association "through error" and is therefore not a valid card. It is not, however, a forgery (457-61).

Phyllis Wigglesworth, a clerk in the office of the Court of Appeals of Kentucky, testified that she received a letter from the defendant's trial attorney, Mortimer Todel, Esq., asking if Adcock was admitted to practice in Kentucky, the letter being received on November 16, 1970 (467-9). She looked at the attorney roster in the Court of Appeals and found Adcock's name there as having been admitted to practice on June 17, 1927. She then telephoned the Bar Association to ascertain if he was in good standing (469-70). The witness was told that Adcock had paid his dues and was "O.K.", but to call back in several days since the official roster book was in the bindery (472-3). When the witness called back, the party at the Bar Association could not find Adcock's name, but saw that he had paid his recent dues and again said he was "O.K." (474). As a result, the witness issued the certificate of good standing (Exhibit F, 613-14) on December 7, 1970 (477-80).

The Defense

Sol Marks, a Deputy Director of the INS, testified that formerly an attorney had to be admitted to practice before the INS, and needed a certificate of admission. The rule was changed in 1958, so that any attorney could practice before the INS, and no certificate of admission was required (483-7). An attorney admitted in one state could represent anyone before the INS in any state, but he still must file a notice of appearance (489-90). However, a disbarred attorney cannot practice before the INS (491-2).

Stipulation—It was stipulated that the defendant is admitted to practice before the United States District Court for the Western District of Kentucky (Exh. I, 617-18), and that the fact that an attorney has been disbarred from one court does not mean he is disbarred before a different court (495-6).

Reasons for Granting the Writ

I. The supplemental "Allen charge" coerces the jury into reaching a verdict, thus denying due process and a fair trial. Because of the division among the Federal circuits, this Court should consider whether the "Allen charge" should be permitted in the Federal courts.

After the jury had been deliberating for about four and a half hours, it sent a note to the court asking: "Must we have a unanimous decision on each count? Can we return a unanimous verdict on some counts and not others?", and "If the decision is not unanimous on any count, is the defendant considered not guilty on this count?" (549). Before the jury returned, the trial judge

told counsel that he would "give them the equivalent of the Allen charge" [*Allen* v. *United States,* 164 U.S. 492 (1893)] (549). The court then charged the jury (553-60), reading from the Allen opinion (558), paraphrasing it, and adding material he thought relevant.

The Allen charge, emphasizing that the jurors in the minority should listen with a view to being convinced to the arguments of the majority, "is designed to blast loose a deadlocked jury" [*Green* v. *United States,* 309 F.2d 852, 854 (5th Cir. 1962)]. It has thus received uncomplimentary sobriquets, such as the "dynamite charge" [*Green* v. *United States,* 309 F. 2d 852, *supra*], the "nitroglycerin charge" [*Huffman* v. *United States,* 297 F. 2d 754, 759 (5th Cir. 1962)], the "third degree instruction" [*Leach* v. *People,* 146 P. 2d 346, 347 (Colo. 1947)] or the "shotgun instruction" [*State* v. *Nelson,* 321 P. 2d 202, 204 (N.M. 1958)]. The Arizona Supreme Court ruled that "its use shall no longer be tolerated" [*State* v. *Thomas,* 342 P. 2d 197, 200 (Ariz. 1959)], and Montana has similarly banned its use [*State* v. *Randall,* 353 P.2d 1054 (Mont. 1960)], while commentators have severely criticized its application [see, *e.g.,* 2 C. Wright, *Federal Practice and Procedure* (*Criminal*), sec. 502 at 360, 1969; Comment, *On Instructing Deadlocked Juries,* 78 Yale L.J. 100, 1968; Note, *Due Process, Judicial Economy and the Hung Jury: A Re-examination of the Allen Charge,* 53 Va. L. Rev. 123, 1967]. Moreover, both the American Bar Association Project on Minimum Standards for Criminal Justice and the Committee on the Operation of the Jury System of the Judicial Conference of the United States Courts have both recommended that the Allen charge no longer be given to deadlocked juries,

instead formulating alternative instructions [see *United States* v. *Sawyers*, 423 F.2d 1335, 1346 (4th Cir. 1970)].

In the Federal courts the circuits are severely divided. The Second Circuit, for instance, has consistently upheld the use of the Allen charge [*United States* v. *Thomas*, 282 F.2d 191, 195 (2d Cir. 1960); *United States* v. *Tolub*, 309 F.2d 286 (2d Cir. 1962); *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir. 1967); *United States* v. *Rao*, 394 F.2d 554 (2d Cir. 1968); *United States* v. *Hynes*, 424 F.2d 754 (2d Cir. 1970); *United States* v. *Martinez*, —— F. 2d —— (2d Cir. dec. July 15, 1971); *Meyers* v. *United States*, —— F.2d —— (2d Cir. dec. July 27, 1971)], and the Sixth Circuit has also approved its use [*United States* v. *Barnhill*, 305 F. 2d 164 (6th Cir. 1962)], as has the Fourth Circuit [*United States* v. *Sawyers*, 423 F.2d (4th Cir. 1970); but see *United States* v. *Rogers*, 289 F.2d 433 (4th Cir. 1961)], and the Ninth Circuit [*Sullivan* v. *United States*, 414 F.2d 714 (9th Cir. 1969)].

In contrast, the Third Circuit has outlawed future use of the Allen charge [*United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969)], as has the District of Columbia Circuit [*United States* v. *Thomas*, —— F.2d —— (D.C. Cir. 1970)], and the Seventh Circuit [*United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969)]. The Tenth Circuit has suggested that if an Allen charge be given, it must be given in the main charge and not as a supplemental instruction [*United States* v. *Wynn*, 415 F.2d 135 (10th Cir. 1969)], while the Fifth Circuit has often severely criticized its application [*Thaggard* v. *United States*, 354 F.2d 735 (5th Cir. 1965); *Green* v. *United States*, 399 F.2d 852 (5th Cir. 1962); *Powell* v. *United States*, 297 F.2d 318 (5th Cir. 1964);

Huffman v. *United States,* 297 F.2d 754 (5th Cir. 1962)]. Consequently, in view of the serious divisions among the Federal circuit courts, and the great amount of litigation engendered by the uncertain situation respecting the Allen charge, petitioner urges that this Court review and settle the issues involved in the exercise of its supervisory powers over the Federal courts. As stated in the opinion of Judge Wisdom in *Andrews* v. *United States,* 309 F.2d 127 (5th Cir. 1962):

> "The Allen charge causes more trouble in the administration of justice than it is worth. Its time-saving merits in the district court are more than nullified by the complications it causes on appeal when the reviewing court must determine whether in the circumstances of a particular case the trial judge applied the charge properly—in substance and in timing, 'like Banquo's ghost it will not remain at rest' * * * And in this Circuit the ghost seems especially restless."

Clearly, the ghost is haunting all the other circuits as well.

In addition, petitioner urges that the supplemental Allen charge *per se* exercises a coercive influence on the jury, thereby denying Sixth Amendment rights to trial by an impartial jury [*cf., Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Turner* v. *Louisiana,* 379 U.S. 466 (1965)]. *United States* v. *Fioravanti,* 412 F.2d 407, *supra,* recognizes quite explicitly the constitutional infirmities of the Allen charge. For despite language about each juror deciding for himself, the Allen charge, as used in the courts, intends, encourages and specifies that the minority reconsider the views of the majority "with a disposition to be convinced" [*Allen* v. *United States,* 164 U.S. 492, 501, *supra*]. However, there

is no reason to believe the majority "is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality". *United States* v. *Fioravanti*, 412 F.2d at 416, *supra*. Thus, the "very real treachery of the Allen charge" is the failure to tell the majority to reexamine its position, and the instruction "serves to substitute the coercive influence of any early polling of the jury for the give and take of group deliberation" (*id.* at 417). Consequently, the Allen instruction allows, indeed subtly encourages, the minority to be coerced by numbers, a clear violation of the jury trial principle protected by the Sixth Amendment.

> "Where a verdict of guilty is generated by the process of being influenced by a preliminary vote of the majority instead of subjective convincement beyond a reasonable doubt, at best we have a situation where two separate portions of the charge are at loggerheads; at worst, we have a serious question that the charge may have become constitutionally delinquent, in derogation of the defendant's traditional right of trial by jury." [*United States* v. *Fioravanti*, 412 F.2d at 419, *supra*].

Consequently, petitioner urges that this Court grant certiorari to review the constitutional implications of the Allen charge in the light of Twentieth Century developments. As Judge Brown stated in *Huffman* v. *United States*, 297 F.2d 754, 759 (5th Cir. 1962):

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the *Allen* charge."

II. Even if the Allen charge is not *per se* coercive the Court's supplemental charge in this case was improper, the instruction going far beyond the language of the Allen charge by exhorting the jury to consider the cost in time and money of the present trial and any future trial.

In the present case, the court was not content to rest on the language of the Allen charge alone. Instead, the court improperly added to and went beyond the boundaries of the Allen charge by specifically exhorting the jury to deliberate on improper and irrelevant considerations, namely, the cost in time and money of the trial and of a future trial if the jury remained undecided.

It is clear that even among the circuits holding the Allen charge not *per se* coercive, it nevertheless "approaches ultimate permissible limits" in instructing an undecided jury [*Sullivan* v. *United States*, 414 F.2d 714, 716, *supra*; *United States* v. *Rogers*, 289 F.2d 433, 435-7, *supra*; *Powell* v. *United States*, 297 F.2d 318, *supra*; *Green* v. *United States*, 309 F.2d 852, *supra*; also see, *Burton* v. *United States*, 196 U.S. 283 (1905); *Brasfield* v. *United States*, 272 U.S. 448 (1926)]. And in the present case, the court below overstepped that limit.

The trial judge told the jury that "I want you to listen with care to what really should govern your efforts as you continue deliberation" (555). After a sentence disavowing any attempt to coerce a verdict, the court stressed that "this is an important case, important to the defendant, important to the Government, important to the community." The court then talked about the expense of the trial,

and told the jury to consider the possibility and waste in time and money of a retrial:

> "The trial has been expensive. If you should fail to agree on a verdict with regard to any count, that count is left open and undecided. Like all cases, it must be disposed of some time.
>
> "There appears absolutely no reason to believe that another trial would not be equally expensive, nor does there appear any reason whatsoever to believe that the case can be tried again more expertly or more exhaustively than it has been on either side. Any future jury must be selected in the same manner and from the same source as you were chosen. There appears to this Judge no reason to believe that the case would ever be submitted to twelve jurors more intelligent, more impartial or more competent to decide it or that more or clearer evidence would be produced on behalf of either side" (556).

Such considerations have no place in a jury's deliberations. Particularly, they are inappropriate heading a discussion of "what really should govern your efforts as you continue deliberation" (555).

It is true that courts are now constantly concerned with obtaining dispositions in order to unclog overcrowded calendars. Such concerns, however, have been severely criticized when they become a consideration in the rendition of justice, since an individual defendant is entitled to a decision on the merits of his case alone, without extraneous administrative factors interfering with or influencing the result [see, Report of the President's Crime Commission, *The Challenge of Crime in a Free Society,* 128 (1967)]. How much more improper it is when these factors, rather

than playing a subtle and disturbing background role in the administration of criminal justice, are openly used to pressure a jury into reaching a verdict. The Allen charge allows a court to tell jurors that they should be amenable to reconsidering their views in order to reach a decision. It does not authorize a court to instruct the jury that expenditures and savings in time and money should be considered as a factor in its deliberations. For a jury should reach a verdict solely if it is convinced one way or the other by the merits of the case, and not because it feels a decision will help to avoid administrative burdens. As the Supreme Court stated in *Brasfield* v. *United States,* 372 U.S. 448 (1926), in reversing a conviction because of a judge's pressure on an undecided jury, there can be no "improper influence upon the jury, from whose deliberation every consideration other than that of the evidence and the law * * * should be excluded" (*id.* at 450). The expense in time and money is neither evidence nor law.

Indeed, in *Thomas* v. *United States,* —— F.2d ——, (D.C. Cir. Nov. 6, 1970), the trial court similarly told the jury that "we have a substantial backlog of work, and to spend another day before another jury retrying this case just doesn't make sense to me." The court, reflecting on this addition to the Allen charge, wrote:

> "We have no doubt whatever that the judge acted out of the best of motives, and that any coercion of the jury was entirely unintended. The events transpiring, however, invoke our responsibility to appraise the activities complained of, not by the good intentions behind them, but according to whether, all circumstances considered, they strayed beyond legitimate bounds with a substantial probability of prejudice to the accused.

> "The events shown on the record make a strong claim to reversal of appellant's conviction for actual, though undesigned, coercion of the jury that proclaimed it."

Moreover, thorough and scholarly analysis of the problems associated with the Allen charge (Comment, *On Instructing Deadlocked Juries,* 78 Yale L. J. 100, 1968) points out in a section entitled "What the Judge Should Avoid" that references to the expense of a new trial definitely should be avoided.

> "Such references, like post-deliberation comments on the case or the evidence, tend to identify the judge with one jury faction. The expense of a new trial falls more heavily on the plaintiff or prosecution than on the defendant. In most criminal cases, it will not be the defendant who suffers from a new trial, but the government. Jurors realize that retrials seldom occur when the first jury hangs, and the judge rarely points out that any time the defendant serves before conviction will not count against his sentence. Harm is compounded by the indiscriminate way judges mix together references to expenses incurred by the government as prosecutor with those incurred as forum. The jury is led to associate a saving of the judge's time with a saving of the prosecutor's since both are expenses to be borne by the 'taxpayer.' (*id.* at 139).

Indeed, the result of this expanded Allen charge is clearly seen in the verdict here. For the decision in the present case was announced an hour and a half after the court's supplemental instruction (561-2), and the verdict was an inconsistent one. The defendant was found guilty on two counts (2 and 5) on which the evidence was virtually the same as on the two counts for which he was

acquitted (3 and 4) (compare Exhs. 2, 3, 4, 5, 588-95). Obviously, the jury's indecisiveness on the issue of guilt was transformed by the court's pressure to reach a verdict into a split decision to satisfy the instruction to dispose of the case. Under such circumstances, a fair trial was not had, and a new one should be granted.

Conclusion

Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 977.—September Term, 1970

(Argued June 11, 1971 Decided August 16, 1971.)

Docket No. 71-1289

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM F. ADCOCK,

Appellant.

Before:

Friendly, Chief Judge,
Hays and Oakes, Circuit Judges.

Appeal from a judgment of conviction entered after jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge, on three counts of making and causing to be made false statements in violation of 18 U.S.C. §1001 and 18 U.S.C. §2.

Affirmed as to Count I, reversed as to Counts II and V.

Maurice M. McDermott, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, of counsel), for Appellee.

Alan Scribner, Esq., New York, New York, for Appellant.

Per Curiam:

Appellant attacks his conviction after a guilty verdict on Counts I, II and V of an indictment charging that he had made and caused to be made false statements to the Immigration and Naturalization Service in violation of 18 U.S.C. §1001 and the aiding, abetting or causing section, 18 U.S.C. §2. He complains that after the jury deliberated one evening and resumed deliberation the next morning, for a total of four and one-half hours, the trial judge gave a modified "Allen" charge. *Allen* v. *United States,* 164 U.S. 492, 501-2 (1893). The trial court, however, scrupulously followed the rule in this circuit, by emphasizing that no juror was expected to yield a conscientious conviction. *United States* v. *Bowles,* 428 F.2d 592 (2d Cir.), cert. denied, 400 U.S. 928 (1970); *United States* v. *Barash,* 412 F.2d 26, 32 (2d Cir.), cert. denied, 396 U.S. 832 (1969). We are satisfied that the judge below conscientiously phrased the charge so that no juror felt coerced to abandon his personal conviction.

Counts II and V on which appellant was convicted were based on his failure to sign as preparer an I.N.S. form seeking an extension of stay by an alien, when he in fact prepared the form for the alien. The Government's rather far-fetched argument is that by preparing the form but failing to sign it as preparer, appellant had "caused" a false statement to be made by the applicant who merely signed as such. Nowhere does the form contain any assertion by the applicant that he himself prepared the form. Even the Government admits that the "failure to complete the 'preparer's box strictly speaking did not result in a direct false statement by him to I.N.S. but rather resulted in one *unwittingly* made by the applicant, to the effect that

she alone prepared the document" (emphasis supplied). (Appellee's Brief, p. 10.) The Government points to no case which would support this tenuous position, which would doubtless put behind bars thousands of people who have assisted aliens having trouble with the I.N.S. forms or the English language. We believe a "statement" is required to create an offense under 18 U.S.C. §1001 and that one has not been made here. See *United States* v. *McCue*, 301 F.2d 452, 454 (2d Cir. 1962); *United States* v. *Stark*, 131 F.Supp. 190, 205 (D. Md. 1955). See also *United States* v. *Diago*, 320 F.2d 898, 905 (2d Cir. 1963).

Nor do we agree with the Government's argument that the judgment on Count II should be affirmed because it contained three assignments of falsity and defendant did not request a special verdict. See *United States* v. *Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948); *United States* v. *Mascuch*, 111 F.2d 602 (2d Cir.), cert. denied, 311 U.S. 650 (1940). Special verdicts as to a single count are improper and in and of themselves erroneous. *United States* v. *Spock*, 416 F.2d 165, 182-3 (1st Cir. 1969); *Gray* v. *United States*, 174 F.2d 919 (8th Cir.), cert. denied, 338 U.S. 848 (1949). No provision is made for them in the Federal Rules of Criminal Procedure. See *United States* v. *Noble*, 155 F.2d 315, 317 n. 4 (3rd Cir. 1946); see generally 2 Wright, Federal Practice and Procedure §512, pp. 364-65 (1969). Thus, the verdict on Count II as well as Count V must fall. *Street* v. *New York*, 394 U.S. 576, 585-88 (1969); *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Stromberg* v. *California*, 283 U.S. 359 (1931).

Because there was a valid conviction on Count I for making a false statement in his own Notice of Appearance for an applicant—the only complaint being on the Allen

charge—and because the appellant received concurrent sentences on all three counts, we affirm under *United States* v. *Febre,* 425 F.2d 107, 113 (2d Cir.), cert. denied, 400 U.S. 849 (1970); *United States ex rel. Weems* v. *Follette,* 414 F.2d 417, 419 (2d Cir. 1969), cert. denied, 397 U.S. 950 (1970).

We might remand for a new trial on Count I if we felt that there was a "spill over" of the evidence that affected the Count I conviction.* See Hays, J., dissenting in *United States* v. *Febre,* supra at 114. Or we might remand for resentencing if we felt that the convictions on the reversed counts may have affected the sentences imposed on the remaining counts. See *United States* v. *Hines,* 256 F.2d 561 (2d Cir. 1958). We are aware of the admonition in *Benton* v. *Maryland,* 395 U.S. 784, 789 (1969), regarding the concurrent sentence doctrine. But here, as in Febre, supra, and Weems, supra, we conclude that "no undesirable collateral consequences" would ensure from its application. Therefore, we affirm the conviction on Count I of the indictment and reverse those on Counts II and V.

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* In this case we would doubtless remand on Count II also for reconsideration of the allegations in Count II that the defendant had [illegible] caused to be made false statements about one applicant's

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No. 71-314

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM F. ADCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-314

WILLIAM F. ADCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner, an attorney, was convicted on three counts of a five-count indictment charging him with causing false statements to be made to the Immigration and Naturalization Service, and with personally making such false statements, in violation of 18 U.S.C. 2 and 1001, respectively. He was sentenced to concurrent prison terms of one year on each count. The court of appeals affirmed the conviction on the first count *per curiam*,[1] but reversed the convictions on the other two counts (Pet. App.).

[1] Count I charged petitioner with making a false statement in his own notice of appearance on behalf of an applicant before the Immigration and Naturalization Service.

Petitioner contends here, as he did below, that his conviction should be overturned because the trial judge gave the supplemental "*Allen*" charge (*Allen* v. *United States*, 164 U.S. 492). We do not agree.

After the jury had deliberated for four and one-half hours, over the course of two days, it sent a note to the court asking: "Must we have a unanimous decision on each count? Can we return a unanimous verdict on some counts and not others? If the decision is not unanimous on any count, is the defendant considered not guilty on this count?" (Tr. 549).[2] The court informed counsel of its intention to "give them [the jury] the equivalent of the *Allen* charge"; the trial judge then so charged the jury, reading from a portion of the *Allen* case, and giving some additional explanatory remarks of his own (Tr. 549, 553–560).

1. It is petitioner's principal contention that use of the supplemental charge is prejudicial *per se*, in that it exercises a "coercive influence on the jury, thereby denying Sixth Amendment rights to trial by an impartial jury * * *" (Pet. 15). No federal court that has considered the question, however, has yet found that the mere giving of the *Allen* charge is *per se* reversible error. See *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934;[3] *United*

[2] "Tr." references are to the transcript of proceedings in the trial court, which was filed by petitioner as an appendix in the court of appeals.

[3] Without specifically reconsidering or overruling *Fulwood*, the Court of Appeals for the District of Columbia, sitting *en banc* in *United States* v. *Thomas*, No. 22,768, decided September 14, 1971, in the exercise of its supervisory power, adopted prospectively the standard and instruction approved by the American Bar Association for future charges of the *Allen*-type.

States v. *Bowles*, 428 F. 2d 592 (C.A. 2), certiorari denied, 400 U.S. 928; *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835; *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946. Although some federal courts have adopted prospective modifications of the standard *Allen* charge (see *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017;[4] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837), these modifications were ordered in the exercise of the appellate courts' supervisory powers and, as such, do not warrant further review by this Court. See *Fisher* v. *United States*, 328 U.S. 463, 476–477.

2. Petitioner also asserts that, even if the *Allen* charge is not *per se* coercive, the supplemental instruction in this case was improper. The argument finds little support in the record. After answering the jurors' inquiries, the trial judge attempted to establish guidelines to aid the jury in its deliberations, while also disavowing any attempt to coerce or influence the jury (Tr. 553–555). He stressed the importance of the case to the defendant, the government and the community; he then made the following comments which petitioner claims introduced improper considerations into the jury's deliberations (Tr. 556):

> * * * The trial has been expensive. If you should fail to agree on a verdict with regard to any

[4] In *Brown* petitioner's constitutional arguments were rejected by the court. See also *Hodges* v. *United States*, 408 F. 2d 543 (C.A. 8).

> count, that count is left open and undecided. Like all cases, it must be disposed of some time.
>
> There appears absolutely no reason to believe that another trial would not be equally expensive, nor does there appear any reason whatsoever to believe that the case can be tried again more expertly or more exhaustively than it has been on either side. Any future jury must be selected in the same manner and from the same source as you were chosen. There appears to this Judge no reason to believe that the case would ever be submitted to twelve jurors more intelligent, more impartial or more competent to decide it or that more or clearer evidence would be produced on behalf of either side.

These comments, when viewed in the context of the entire supplemental charge, did not have a coercive effect on the jury. The trial judge repeatedly instructed the jury that if, after deliberating among themselves, certain jurors could not, according to their conscience, reach agreement, it was their sworn duty to withhold consent to the verdict (Tr. 555, 557, 559). Moreover, any conceivable uncertainty that may have arisen from the above references to the cost, in terms of time and money, of a possible retrial, was eliminated by the judge's remarks just prior to the close of the supplemental charge (Tr. 559):

> You would be prostituting your oath if you were to say, "Well, it's going to cost money and all that, so, okay, I'll go along." What kind of an argument is that? Ministers of justice doing a thing like that? That is not fulfilling your obligation. These parties, the Government and the defendant, are entitled to your verdict. If your verdict means acquittal as to some or as to all or

guilt as to one or all or disagreement to one or all, after due deliberations, if that is what you come up with, then stand on your feet and say so. * * *

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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